In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-952

JOHN DABNEY COLLIER WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The petition for a writ of certiorari involves solely a challenge to the trial judge's imposition of a two-year prison sentence instead of placing petitioner on probation. Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of willfully failing to register for military service, in violation of 50 U.S.C. App. 462(a) and was sentenced to two years' imprisonment. The court of appeals affirmed in a written opinion (Pet. App.) upon which we principally rely.

Petitioner became 18 years of age on January 7, 1971

(Tr. 24).[1] On January 11, he and a companion entered the offices of Local Board No. 10 in Salem, Massachusetts (*ibid.*), the appropriate board for administration of his Selective Service obligations, and spoke with the Executive Secretary. Petitioner said that he had come to advise the board that he refused to register for the draft (Tr. 25). Miss Hayes, the secretary, responded that it was the duty of every male to register upon reaching the age of 18, and that his failure to register could result in imprisonment or a large fine (Tr. 7). Petitioner gave his name and address (*ibid.*) and date of birth (Tr. 6) and left the office. The next day the board mailed petitioner a letter (Govt. Ex. 1) which requested his prompt registration (Tr. 5). Petitioner did not respond. His indictment, trial and conviction followed.

After return of the verdict, the court conducted a pre-sentence hearing at which it received a Government recommendation of a two-year sentence (Sent. Tr. 2). The court also received testimony of the defendant and a witness (Sent. Tr. 3-6) in support of a request for probation (Sent. Tr. 6) in addition to argument from both defense and government counsel. A judgment of two years' imprisonment was then pronounced (Sent. Tr. 16).

2. The petition does not challenge the validity of the conviction (Pet. 8). The only issue raised in this court is the validity of the sentence. The maximum sentence permitted by the statute under which petitioner

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[1] "Tr." references are to the transcript of the trial held March 23, 1972. "Sent. Tr." references are to the transcript of the sentencing hearing held May 3, 1972.

was convicted is imprisonment for five years and a fine of $10,000. Petitioner's two-year sentence was well within this limit. Nor has petitioner shown any procedural irregularities in the sentencing. Essentially petitioner argues that the sentence was too harsh and that he should have received probation. This question was fully and sympathetically reviewed by the court below (Pet. App. 32-35) and does not require further review by this Court.

3. The court of appeals has expressed its "uneasiness" with the length of the sentence in light of the unquestioned sincerity of the defendant's beliefs, his good reputation in the community, and the candor of his refusal to register (Pet. App. 32-35). The court of appeals has suggested that instead of pressing for appellate review of the sentence—the exercise of a power that federal appellate courts have generally considered themselves to lack—petitioner's appropriate remedy is a motion for reduction of sentence under Rule 35 Fed. R.Crim.P. (Pet. App. 35). On such a motion the district judge can properly take into consideration the views expressed by the court of appeals as well as other changes that have occurred since the date of sentencing.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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